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In the Supreme Court of the United States

OCTOBER TERM, 1984

DUANE SKINNER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE EIGHTH CIRCUIT COURT OF APPEALS HAS RENDERED THE BANK SECRECY ACT OF 1970 UNCONSTITUTIONAL BY HOLDING THAT A NON-BANK EMPLOYED PERSON HAS A DUTY UNDER THAT ACT TO PURCHASE A SINGLE BANK CASHIER'S CHECK RATHER THAN PURCHASING A SERIES OF SEPARATE BANK CASHIER'S CHECKS FROM *DIFFERENT* BANKS WHENEVER THE TOTAL AMOUNT OF THE SERIES OF SEPARATELY PURCHASED CHECKS WOULD EXCEED THE SUM OF TEN THOUSAND DOLLARS AND WOULD, CONSEQUENTLY, CONSTITUTE A "REPORTABLE" CURRENCY TRANSACTION UNDER REGULATIONS WHICH THE SECRETARY OF THE TREASURY HAS PROMULGATED PURSUANT TO THE BANK SECRECY ACT?

II. WHETHER REQUIRING A NON-BANK EMPLOYED PERSON TO SO ORDER HIS FINANCIAL TRANSACTIONS AS TO MAKE THEM "REPORTABLE" UNDER THE BANK SECRECY ACT OF 1970 WHENEVER POSSIBLE VIOLATES THE FIFTH AMENDMENT?

TABLE OF CONTENTS

Questions Presented for Review I
Table of Authorities II
Opinions Below 1
Jurisdiction 2
Statutes Involved 2
Statement of the Case 5
Reasons for Granting a Writ of Certiorari 7
Conclusion 13

Appendix:

Judgment of District Court and Commitment Order A1
Opinion of Eighth Circuit Court of Appeals A2
Petition for Rehearing and/or Suggestion for Petition for Rehearing En Banc A36

TABLE OF AUTHORITIES

Cases

California Bankers Association v. Shultz, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974) 8, 9, 10, 11, 12-13
Edwards v. United States, 265 F.2d 3002 (9th Cir. 1962) 8
Haynes v. United States, 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968) 12, 13
Ohio v. Roberts, 448 U.S. 56 (1980) 5
United States v. Dorey, 711 F.2d 125 (9th Cir. 1983) 8
United States v. Irwin, 654 F.2d 671 (10th Cir. 1981) 8

Constitutional Provisions

Fourth Amendment, United States Constitution 9
Fifth Amendment, United States Constitution 12, 13

Statutes

12 U.S.C. 1703d 4
12 U.S.C. 1829b 4
18 U.S.C. 371 5
18 U.S.C. 1001 .....2, 3, 7
18 U.S.C. 2314 5
28 U.S.C. 1254(1) 2
31 U.S.C. 5311, *et seq.* 4
31 U.S.C. 5313 .....3, 9, 11
31 U.S.C. 5315 4

Rules

Supreme Court Rule 17 ..... 2, 9
Supreme Court Rule 17.1(c) 9
Supreme Court Rules 20 and 28.2 2

Other

IRS Form 4789 11

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

DUANE SKINNER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

Duane Skinner, Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the Eighth Circuit Court of Appeals which was entered in the above-entitled case on the 6th day of August, 1984.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at ..... F.2d ..... (8th Cir. 1984). A copy of that opinion is contained in the Appendix, *infra*, beginning at page A1.

The Judgment and Commitment Order was entered by the United States District Court for the Eastern District of Missouri, the Honorable John F. Nangle presiding.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on August 6, 1984. A Petition for Rehearing with Suggestions of Rehearing En Banc was denied on ....., 1984 (Appendix, *infra*, page A36). This Petition has been timely placed in the mails, as provided for in Supreme Court Rules 20 and 28.2, within 60 days from that date and is, thus, timely filed in accordance with the rules of this Honorable Court.

Jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1), and Rule 17 of the Revised Rules of the Supreme Court of the United States.

STATUTES INVOLVED

This Petition relates primarily to Count Twenty-Nine of the multi-count Indictment filed against Petitioner. Count Twenty-Nine charged Petitioner with a violation of Section 1001 of Title 18, United States Code. That section states in its entirety:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or docu-

ment knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000.00 or imprisoned not more than five years, or both."

Count Twenty-Nine alleged that Petitioner violated Section 1001 by covering up and concealing

". . . by means of a scheme, trick and device . . . the material fact that Duane Skinner was dealing in amounts of United States currency exceeding $10,000.00 in a single day at various financial institutions."

The alleged scheme involved the purchase of a series of bank cashier's checks each in an amount of *less than* $10,000.00 from different banks on the same day (the total of all such purchases being *in excess* of $10,000.00), thereby avoiding any reporting requirement that the individual banks would have to report a transaction of more than $10,000.00 under 31 U.S.C. Section 5313 (formerly 31 U.S.C. Section 1081). Section 5313 expressly provides:

"*Reports on domestic coins and currency transactions.*

(a) When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

(b) The Secretary may designate a domestic financial institution as an agent of the United States Government to receive a report under this section. However, the Secretary may designate a domestic financial institution that is not insured, chartered, examined, or registered as a domestic financial institution only if the institution consents. The Secretary may suspend or revoke a designation for a violation of this subchapter [31 U.S.C. Secs. 5311, *et seq.*] or a regulation under this subchapter [31 U.S.C. Secs. 5311, *et seq.*] (except a violation of Section 5315 of this title [31 U.S.C. Sec. 5315] or a regulation prescribed under Section 5315 [31 U.S.C. Sec. 5315]), Section 411 of the National Housing Act (12 U.S.C. 1703d), or Section 21 of the Federal Deposit Insurance Act (12 U.S.C. 1829b).

(c)(1) A person (except a domestic financial institution designated under subsection (b) of this section) required to file a report under this section shall file the report—

(A) with the institution involved in the transaction if the institution was designated;

(B) in the way the Secretary prescribes when the institution was not designated; or

(C) with the Secretary.

(2) The Secretary shall prescribe—

(A) the filing procedure for a domestic financial institution designated under subsection (b) of this section; and

(B) the way the institution shall submit reports filed with it."

STATEMENT OF THE CASE

Petitioner was charged, as one of three defendants in a 43 count indictment, with violating 18 U.S.C. Section 371 (conspiracy), 18 U.S.C. Section 2314 (transporting forged checks in interstate commerce). He was convicted of all these charges in the District Court following a jury trial.

On appeal, his convictions for violating 18 U.S.C. section 2314 were reversed. The Eighth Circuit Court of Appeals found that error had also been committed by the District Court in permitting the introduction of hearsay evidence of statements made by a non-testifying and non-indicted conspirator, Thomas Brimberry (who was described by the Eighth Circuit Court of Appeals as the "mastermind" behind the scheme which underlaid all the charges in the indictment). Although the Eighth Circuit found this error to be of a constitutional magnitude [and contrary to this Honorable Court's express holdings in *Ohio v. Roberts,* 448 U.S. 56 (1980)], the Eighth Circuit Court of Appeals nonetheless found that error to be harmless beyond a reasonable doubt. Appendix, *infra,* page A20.

The facts at trial indicated that the unindicted co-conspirator Thomas Brimberry had concocted a scheme to loot the Stix & Company stock brokerage firm and had used Petitioner and others as witting or unwitting tools in concealing the funds taken from that looting. Page 41, Volume 2 of the Transcript (hereinafter cited 2 TR 41); 2 TR 42, 2 TR 53, 54.

Those concealment efforts included instructing Petitioner to purchase a number of bank cashier's checks from different banks on different dates. 3 TR 83; 12 TR 54, 64. Acting pursuant to these instructions, Petitioner purchased

a series of bank cashier's checks from nine different banks in amounts varying from $5,500.00 to $7,500.00 on April 11, 1980; purchased a series of bank cashier's checks from four different banks in amounts of $7,500.00 each on April 30, 1980; purchased a series of bank cashier's checks from six different banks in the amount of $7,500.00 each on May 6, 1980; and purchased a series of bank cashier's checks on October 2 and 3, 1980 from six different banks in amounts varying from $5,000.00 to $7,500.00. Pages 29-31 of the Indictment.

REASONS FOR GRANTING A WRIT OF CERTIORARI

It is respectfully submitted that Certiorari should be granted to review the opinion and judgment of the Eighth Circuit Court of Appeals in this case because of the constitutional error reflected in that opinion and because the erroneous interpretation placed on the Bank Secrecy Act by the Court of Appeals will have a substantial adverse impact on the way financial transactions are handled in the future.

I. THE EIGHTH CIRCUIT COURT OF APPEALS HAS RENDERED THE BANK SECRECY ACT OF 1970 UNCONSTITUTIONAL BY HOLDING THAT A PRIVATE CITIZEN HAS A DUTY UNDER THAT ACT TO PURCHASE A SINGLE BANK CASHIER'S CHECK RATHER THAN PURCHASING A SERIES OF SEPARATE CHECKS FROM DIFFERENT BANKS WHENEVER THE TOTAL AMOUNT OF THE SEPARATELY PURCHASED CHECKS WOULD EXCEED THE SUM OF TEN THOUSAND DOLLARS AND WOULD, CONSEQUENTLY, CONSTITUTE A "REPORTABLE" CURRENCY TRANSACTION UNDER REGULATIONS WHICH THE SECRETARY OF THE TREASURY HAS PROMULGATED PURSUANT TO THAT ACT.

The law is clear that in a "concealment" case brought under 18 U.S.C. Section 1001, the prosecution must prove that the person "concealing" the information has an express *duty* to report the concealed information to a governmental

agency. *Edwards v. United States,* 265 F.2d 3002 (9th Cir. 1962). This principle has been reiterated by various other Courts of Appeal. *E.g., United States v. Dorey,* 711 F.2d 125, 126 (9th Cir. 1983); *United States v. Irwin,* 654 F.2d 671, 679 (10th Cir. 1981). As was expressly stated (and held) in *United States v. Dorey, supra,* at 711 F.2d 128:

> "In a prosecution under section 1001 it is 'incumbent upon the Government to prove that the defendant had the duty to disclose the material facts at the time he was alleged to have concealed them.' "

The Eighth Circuit Court of Appeals nonetheless categorically rejected Petitioner's arguments that he, himself, had no duty under the Bank Secrecy Act to cumulate the amount of separately purchased bank cashier's checks and to purchase a single check in excess of $10,000.00 if he could do so:

> "Skinner protests that his failure to cumulate the various cashier's checks he 'purchased from time to time' states no violation of federal law because the banking regulations put no duty on the taxpayer to assist financial institutions in carrying out their reporting duties. We find no merit in this contention."

Appendix, *infra,* page A29.

The interpretation placed on the Bank Secrecy Act by the Eighth Circuit raises issues which this Honorable Court has previously stated in *California Bankers Association v. Shultz,* 416 U.S. 21, 78, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974), "pose substantial and difficult Constitutional questions" concerning the proper interpretation and application of the reporting requirements of the Bank Secrecy Act of 1970. The opinion of the Eighth Circuit Court of Appeals necessarily extends the reporting requirements of

31 U.S.C. Section 5313 (formerly U.S.C. Sections 1081 and 1082) to private citizens (instead of limiting the same to banks and other financial institutions, as this Honorable Court previously ruled was proper in *California Bankers Association v. Shultz, supra*). The opinion and judgment of the Eighth Circuit Court of Appeals is thus directly contrary to the interpretation placed on Section 5313 by this Honorable Court.

As is indicated by this Honorable Court's Rule 17, certiorari is appropriate in such circumstances. Supreme Court Rule 17.1(c) provides that review of a writ of certiorari is appropriate when:

> ". . . a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way which is in conflict with applicable decisions of this Court."

The interpretation which the Eighth Circuit Court of Appeals has placed on Section 5313 also violates the Fourth Amendment to the United States Constitution. As this Court noted in *California Bankers Association v. Shultz, supra,* any extension of the reporting requirements of the Bank Secrecy Act beyond the narrow interpretation placed on that Act by Mr. Justice Rehnquist's opinion would cause the Bank Secrecy Act to be unconstitutional. Five members of this Court so concluded—Justices Powell and Blackmun in concurrence and Justices Douglas, Brennan and Marshall in dissent.

The constitutional question raised in this case is of the very type which gave Justice Powell and Justice Rehnquist the following concern:

> "In their full reach, the reports apparently authorized by the open-ended language of the Act touch upon

> intimate areas of an individual's personal affairs Financial transactions can reveal much about a person's activities, associations and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion rather than scrutiny of a neutral magistrate." 416 U.S. at 79-80.

The Eighth Circuit Court of Appeals' opinion clearly extends the reach of the reporting provisions of the Act since that opinion now places, by judicial declaration rather than legislative action, a duty upon private individuals to cumulate one or more financial transactions which are in amounts of less than $10,000.00 into a single transaction which is greater than $10,000.00 whenever that is possible.

As this Court observed in *California Bankers Association v. Shultz, supra,* some 20 to 30 billion checks come within the reach of the Bank Secrecy Act each year. 416 U.S. 84. Extending a duty to private citizens to order their financial affairs so as to cause multiple checks written on a single day to be cumulated into a single financial transaction which exceeds $10,000.00, under possible penalty of criminal prosecution if that cumulation is not undertaken, thus works a substantial (and adverse) effect on the financial dealings of the private citizens of the United States. The propriety of such a judicial extension of the Bank Secrecy Act must be questioned in light of this fact and the further fact that five members of this Honorable Court intimated in *California Bankers Association v. Shultz,*

supra, that such an extension would make the Act unconstitutional.

The propriety of such judicially effected extension is further questionable in light of the legislative scheme reflected in the Bank Secrecy Act. As Justice Rehnquist specifically noted, "the Act's civil and criminal penalties attach only upon *violation of regulations promulgated by the Secretary;* if the Secretary were to do nothing, the Act itself would impose no penalties on anyone." 416 U.S. at 25. The regulations promulgated by the Secretary of the Treasury do not themselves require a bank (or anyone else) to cumulate distinct transactions made on any given day. That requirement is only suggested in IRS Form 4789 (the so-called "Currency Transaction Report"), which Form states that a *banking institution* should report all transactions which occur in that specific bank for a given person on a single day. Nothing is said in either the regulations or in IRS Form 4789 about cumulating (or reporting) transactions which occur in *different* banking institutions. Nonetheless, the Eighth Circuit Court of Appeals has, by its opinion and holding, judicially imposed just such a duty upon Petitioner and other similarly situated private citizens. We respectfully submit that the Eighth Circuit Court of Appeals is in error in that regard and that this Honorable Court should take action to correct that error and to instruct the Eighth Circuit as to the correct interpretation which is to be placed on Section 5313 of the Bank Secrecy Act.

The interpretation placed on 31 U.S.C. Section 5313 by the Eighth Circuit Court of Appeals not only impacts important Fourth Amendment issues; that interpretation also raises important Fifth Amendment issues.

II. REQUIRING A NON-BANK PRIVATE CITIZEN TO SO ORDER HIS OR HER FINANCIAL TRANSACTIONS AS TO MAKE THEM "REPORTABLE" UNDER THE BANK SECRECY ACT OF 1970 WHENEVER POSSIBLE VIOLATES THE FIFTH AMENDMENT.

Petitioner respectfully suggests that *to the extent that he is to be held under a duty of himself revealing* the fact that he engaged in a series of transactions which cumulatively exceeded the reporting requirement threshold of $10,000.00, then *his* Fifth Amendment rights not to incriminate himself have been violated by the reporting requirements of the Bank Secrecy Act, *as interpreted* by the Eighth Circuit Court of Appeals.

As was pointed out by this Court in *Haynes v. United States,* 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968), where the effect of a statutory section imposing a duty to register or report information will expose the person reporting that information to possible criminal prosecution, then that statutory section necessarily triggers Fifth Amendment considerations. This Court expressly held in *Haynes, supra,* that forcing the petitioner in that case to register a firearm was in violation of his Fifth Amendment rights when:

> ". . . a prospective registrant realistically can expect that registration will substantially increase the likelihood of this prosecution . . . (or where) he can reasonably fear that the possession established by his registration will facilitate his prosecution . . . ."

390 U.S. 97. In the instant case, just as in *Haynes,* the statutory provision under question "has as its primary goal the enforcement of the criminal law." *California Bankers Association v. Shultz, supra,* at 416 U.S. 80, 39

L.Ed.2d 851. The criminal prosecution and law enforcement purposes lying behind the reporting requirements of the Bank Secrecy Act can also be found in the express "Congressional purpose" expressed in that Act. As Justice Brennan pointed out in dissent in *California Bankers Association v. Shultz*, at 416 U.S. 91, the "reporting requirements" of the Bank Secrecy Act "lay down blanket commands that 'records' and 'reports' are required where they 'have a high degree of usefullness in criminal, tax, or regulatory investigations or proceedings.' "

Under these circumstances, the holding of the Eighth Circuit Court of Appeals that Petitioner was under a duty to report information which could possibly (and probably would) lead to his criminal prosecution or which would make that prosecution easier clearly contravenes the Fifth Amendment. *Haynes v. United States, supra.*

CONCLUSION

For all of the above and foregoing reasons, Petitioner respectfully asks this Honorable Court to grant this petition and to cause a writ of certiorari to be directed to the Eighth Circuit Court of Appeals so that the Constitutional error reflected in that Court's opinion can be corrected.

Respectfully submitted,

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APPENDIX

(Filed October 16, 1984)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1984
No. 83-1756

United States of America,
Appellee,

v.

James Massa,
Appellant.

Appeal From the United States District Court
for the Eastern District of Missouri.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said District Court and the briefs of the parties and was argued by counsel.

Upon consideration it is hereby ordered and adjudged that the judgment of the District Court is affirmed in accordance with the opinion of this court.

August 6, 1984

A true copy.

Attest: Robert D. St. Vrain
CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

(Filed August, 1984)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1756

United States of America,
Appellee,

v.

James Massa,
Appellant.

No. 83-1803

United States of America,
Appellee,

v.

Duane Skinner,
Appellant.

Appeals From the United States District Court
for the Eastern District of Missouri.

Submitted: March 12, 1984
Filed: August 6, 1984

Before HEANEY, Circuit Judge, and FLOYD R. GIBSON and HENLEY, Senior Circuit Judges.

HEANEY, Circuit Judge.

James Massa and Duane Skinner appeal their criminal convictions on a forty-three count indictment arising out of the massive swindle of the Stix & Company brokerage firm (Stix). The indictment charged Massa and Skinner with participation in a scheme masterminded by unindicted coconspirator Thomas Brimberry to loot the Stix firm. Brimberry, a one-time margin clerk for Stix, devised a plan for creating false internal records at Stix which allowed funds to be withdrawn from various accounts on the basis of nonexistent collateral. Count one of the indictment charged Massa, Skinner and others with conspiracy. Counts Two through Forty-three charged substantive violations including mail fraud, wire fraud, employment of manipulative and deceptive devices and contrivances in the purchase of Stix stock, causing Stix to keep false records, interstate transportation of false securities, and causing information to be kept from the Internal Revenue Service (IRS). After a fourteen-day trial, the jury convicted both defendants of all counts against them.

On appeal, both defendants challenge the sufficiency of the evidence and the admission of coconspirator hearsay statements. Both defendants also contend that a prejudicial variance existed between the single conspiracy alleged in the indictment and the multiple conspiracies they say were proved at trial. In addition, Skinner argues that the district court should have granted him a severance and that he was deprived of his right to a speedy trial under 18 U.S.C. § 3161(c) (1982). For the reasons detailed below, we affirm Massa's conviction on all counts. We also affirm Skinner's conviction on all but three counts of transporting forged securities in interstate commerce in violation of 18 U.S.C. § 2314 (1982).

I. BACKGROUND

The scheme to loot Stix and spend the money without being detected by the IRS and other governmental agencies was complex, involving some acts in and of themselves not illegal except that they were financed with misappropriated funds. At the center of the scheme was Brimberry and his manipulation of the margin accounts at Stix. As a margin clerk at Stix, Brimberry was responsible for properly maintaining the margin accounts and making sure that they were backed by adequate collateral. In about 1976, he began to make false entries into ten margin accounts, showing the receipt of nonexistent fully paid securities into the accounts. The ten accounts included five controlled by Brimberry, in various straw names; two accounts in the name of Jerry Maeras, an associate of Brimberry's; two accounts in Massa's name; and one account in the name of Arthur Miller, Jr., Brimberry's brother-in-law. The false entries allowed the purported owners of the accounts to withdraw huge sums of money from Stix. Over the life of the scheme, over $16 million was embezzled from Stix in this manner. Massa received approximately $2.5 million of this sum.

The participants in the scheme used various means to avoid detection and maximize their chances for continued success. An ongoing threat was that Stix auditors or government regulatory authorities would count the securities in the vault and realize that the numbers in the company's accounting records were inflated. To avoid this problem, Janice Brimberry, Thomas Brimberry's wife, and others purchased blank stock certificates from a firm in Chicago and had the names of real securities printed on them. Maeras forged the names of the presidents and secretaries of these firms on the certificates and Thomas

Brimberry placed these fraudulent certificates in the vault at Stix.

Money could not be withdrawn from the margin accounts unless Stix showed the required "net capital" invested in the firm. Using embezzled money, Massa helped Brimberry set up subordinated loans to Stix which were counted as net capital by the regulatory authorities and allowed the conspirators to withdraw more money from the company. The first of these loans was ostensibly obtained from a person named A. E. Shaw. Shaw was the maiden name of the wife of Maeras. She never used that name except in connection with this loan transaction. Massa drew up the loan agreement for $150,000 and told Maeras to sign the agreement with the name A. E. Shaw. Massa then had his secretary notarize the agreement. Massa acted as the intermediary between "A. E. Shaw" and Stix. He transferred the money to Stix and had Stix send the interest checks to him. He would then pass the checks on to Maeras with Brimberry's permission, or to Skinner, Brimberry's runner. Brimberry told Stix that Shaw was a wealthy widow who was related to the president of Southern Illinois University and owned an island in the Caribbean. Massa confirmed this story to a Stix officer, saying Shaw was a "well-to-do lady." In fact, Maeras's wife had no money, as Massa knew, and the money came through Brimberry from Stix.

In approximately 1978, Massa arranged another subordinated loan from what purported to be the "Helen Kamadulski Trust." Helen Kamadulski is the maiden name of Brimberry's mother-in-law. She never used that name and neither knew of, nor received any income from, the trust. According to documents prepared and forwarded to Stix by Massa, he was the trustee and the settlor was a "January Management Company." The trust

agreement showed Massa's personal legal secretary as the secretary of the settlor corporation. She at first refused to sign the trust agreement because she knew the January Management Company did not exist. Massa eventually convinced her to sign. In total, the Helen Kamadulski trust loaned Stix $300,000, all of it embezzled from the ten margin accounts at Stix. Massa deposited the interest from the loan, approximately $101,000, in his personal checking account and converted it to his own use.

In order for the scheme to grow to the dimensions that it eventually did, it was necessary for members of the scheme to gain control of the Stix firm. During 1979, Massa purchased controlling interest in Stix using approximately $1 million Brimberry embezzled from the ten padded margin accounts. The money came out of Stix through a series of complicated financial transactions and was sent to Massa in cashier's checks in the names of A. E. Shaw and J. A. Miller. Massa then wrote checks payable to Stix for the stock. Massa claimed at trial that he thought the money came from Brimberry personally; but at the time he purchased the stock, Massa represented to the members and officers of Stix that he was using his own money.

After buying controlling interest in the firm, Massa removed the chief financial officer and another person from the board of directors and added Brimberry. He further promoted Brimberry to senior vice president in complete charge of the operations section of the firm—the section that oversaw the major accounts and the flow of cash from the firm. Massa instructed everyone at Stix, including its president, that Brimberry's directives were to be followed. He told the president of the firm that anyone who disagreed with Brimberry and tried to go over his head took the chance of being fired. After Massa

took control of the firm, the amount of money he was withdrawing from his margin accounts increased substantially. In 1981, when independent auditors questioned evidence of serious cash shortages at Stix, Massa told Brimberry to "fire the auditors." He also caused the board to adopt a resolution granting him consulting fees which totaled over $75,000.

From about 1978 to 1981, participants in the scheme began to exhibit a more lavish lifestyle. Brimberry, Massa, Skinner and others took frequent trips to Las Vegas together, sometimes as often as twice a month. They also traveled on more than one occasion to Hawaii, Disney World, the Bahamas, and Monte Carlo. Brimberry was building a very expensive home in Granite City, Illinois. He became concerned that the IRS might notice his relatively sudden show of wealth and inquire about his source of income. He therefore set up a loan for himself from Massa for $250,000. This money too came from the funds embezzled from Stix. Massa wrote Brimberry a check for the amount.

Another facet of the overall scheme to loot Stix and spend the money undetected was the creation of corporations fronted by Skinner for Brimberry. The largest of these was Miller Excavating, Inc. Massa incorporated this company and was an officer, director and shareholder. Arthur Miller, Jr., and Maeras were also officers and Skinner acted as president from 1978 until approximately 1981. More than $1.3 million of Stix money went to fund the operations and purchase of heavy equipment for the company. In 1980 and 1981, the name of the corporation was changed first to Bernate, Inc., and then to MZA, Inc. Brimberry continued to fund the corporation with Stix money and Skinner continued to act as president. Skinner also fronted two other corporations for Brimberry: Cen-

tury III and Astro Travel. These corporations were also funded with approximately $395,000 in money embezzled from Stix. Massa was the attorney for, and officer and stockholder in, all of these corporations.

In addition to fronting corporations for Brimberry, Skinner did the odd jobs necessary to facilitate the scheme. On at least one occasion, he received the blank stock certificates that were to be forged and placed in the Stix vault and delivered them to Janice Brimberry. The monthly account statements and audit confirmation cards for five of the ten fraudulent accounts at Stix were sent to Miller Excavating where the secretaries turned them over to Skinner. When one of the participants in the scheme, Miller, began to get cold feet, Brimberry sent Skinner to make sure he did not do anything "silly."

Skinner's role in the scheme also included transferring money from other participants to Brimberry. For example, Miller and Brimberry split the money withdrawn from the fraudulent Miller account at Stix on a fifty-fifty basis. In order to effect this split, Skinner and Miller would take Stix's checks payable to Miller to a bank where Miller had an account. Miller would deposit the check to the account and give Skinner Brimberry's half in cash. On other occasions, Skinner would deposit Stix checks directly into Miller's account and later take Miller's checks, made out to cash, cash them at the bank and give Miller and Brimberry their halves in cash.

When Brimberry was building his mansion in Granite City, Skinner helped to hide the source of the funds. Brimberry would give Miller a money order in an amount greater than $50,000 drawn on an account maintained with funds embezzled from Stix. Miller would go to Las Vegas and deposit this money order against his line of credit

at a casino. He would then withdraw the money in cash, bring it to St. Louis, and give it to Brimberry or Skinner. On the instructions of Janice or Tom Brimberry, Skinner would go to different banks on the same day and purchase cashier's checks for less than $10,000 payable to a contractor. This method avoided detection by the IRS which would have been notified by the bank of any cash transactions exceeding $10,000.

Skinner, a certified public accountant, also prepared tax returns for Brimberry and others. The most income Brimberry reported was $87,000 in 1980. This figure took into account only the amount shown on Brimberry's W-2 form, despite the fact that Brimberry was expending millions of dollars through Skinner during that time. Skinner also prepared a tax return for Maeras showing the interest income from the fraudulent A. E. Shaw loan.

In October of 1981, the IRS and a federal grand jury began an investigation into the source of Brimberry's wealth. On November 2, 1981, Brimberry made a deal with the government, which has since been voided.[1] Two days later, when the existence and magnitude of the Stix fraud was disclosed to the public, Brimberry and Skinner left St. Louis and traveled to Phoenix, Arizona, where they resided with their families in Brimberry's $500,000 home until Skinner was arrested approximately a year later. Massa completely severed his relations with Stix when the fraud surfaced.

On December 14, 1982, a forty-three count indictment issued against Massa, Skinner and Miller. In addition to the conspiracy count, Counts Two through Thirteen

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1. Apparently, Brimberry lied to the grand jury because he has since been charged with obstruction of justice and making false statements.

charged Massa with nine separate incidents of mail fraud in relation to the mailing of false audit confirmations, false subordinated loan agreements and a Stix delivery receipt. Counts Twenty-three through Twenty-eight charged Massa with wire fraud based on wire transfers of money on six different dates. In Counts Thirty through Thirty-four, Massa was charged with employment of manipulative and deceptive devices and contrivances in the purchase, on five separate occasions, of Stix stock. In Counts Thirty-five through Thirty-Nine, Massa was charged with five separate counts of causing Stix to keep false records in connection with the fraudulent loan agreements.

Skinner was also charged with conspiracy in Count One. In addition, Counts Fifteen through Twenty-two charged him with eight separate incidents of mail fraud relating to the mailing of false audit confirmation cards. Count Twenty-nine charged Skinner with causing information to be kept from the IRS. This charge was based on the scheme to keep banks from reporting transactions of over $10,000 by purchasing multiple cashier's checks under that amount in a single day. Counts Forty through Forty-three charged Skinner with four incidents of interstate transportation of false securities because he transported cashier's checks bearing forged endorsements from Missouri to Illinois.

On April 28, 1983, following a fourteen-day jury trial, Massa and Skinner were convicted of all counts charged against them in the indictment.[2] Massa was sentenced to twenty years imprisonment, $45,000 in fines and five years probation. Skinner received an aggregate sentence

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2. Miller pled guilty as a result of an agreement with the government on October 8, 1982.

of twelve years imprisonment, $22,000 in fines and five years probation. After the relevant post-trial motions were submitted and denied, Massa and Skinner filed this joint appeal.

II. DISCUSSION

We will first discuss the arguments raised by both defendants concerning the alleged variance between the indictment and the proof at trial and the admissibility of Brimberry's hearsay statements. We will then address both defendants' sufficiency of the evidence arguments in turn. Finally, we will consider Skinner's challenges based on the federal rules governing severance and the Speedy Trial Act.[3]

A. Arguments Raised by Both Defendants.

1. Variance.

Where an indictment alleges a single conspiracy and the government proves the existence of multiple conspiracies, the conviction must be reversed if the variance affects substantial rights of the accused. *Kotteakos v. United States*, 328 U.S. 750, 756-757 (1946); *United States v. Lemm*, 680 F.2d 1193, 1202-1203 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 739 (1983); *United States v. Coward*, 630 F.2d 229, 231 (4th Cir. 1980). In determining whether multiple conspiracies rather than a single one have been proved, "[t]he general test is whether there was 'one overall agreement' to perform various functions to achieve the objectives of the conspiracy." *United States v. Zemek*, 634 F.2d 1159, 1167 (9th Cir. 1980), *cert. denied*, 450 U.S.

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3. In considering these issues, we view the evidence in the light most favorable to the jury's verdict. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

916 (1981); *accord United States v. Lemm, supra,* 680 F.2d at 1203; *United States v. Morrow,* 537 F.2d 120, 126 (5th Cir. 1976), *cert. denied,* 430 U.S. 956 (1977). A conspirator need not know all of the other conspirators or be aware of all the details of the conspiracy, so long as the evidence is sufficient to show knowing contribution to the furtherance of the conspiracy. *E.g., United States v. Lemm, supra,* 680 F.2d at 1204.

Both defendants contend that no single unitary scheme with a common aim was proved at trial. Rather, they maintain the evidence showed distinct conspiracies involving different individuals with different purposes. Massa identifies three such conspiracies: (1) a conspiracy to defraud Stix by manipulating the margin accounts and placing bogus stock in the vault, which allegedly involved Brimberry and his wife and arguably Maeras and Miller; (2) a conspiracy by Massa and Brimberry to conceal from the IRS Brimberry's assets and income; and (3) a similar conspiracy by Skinner, Brimberry, Maeras and Miller to conceal the assets and income of Maeras, Miller and Brimberry.

The defendants' attempts to characterize different aspects of the scheme to loot Stix as separate conspiracies are unpersuasive. The conspirators had one primary goal: to steal from the brokerage firm and spend the money undetected. This single conspiracy did not become a multiple conspiracy simply because the ambitious scope of the scheme demanded subsidiary action. Moreover, both Massa and Skinner were intimately connected to the enterprise as a whole and that the conspiracy's goals remained steady from its inception in 1976 until its discovery in 1981. *See, e.g., United States v. Lemm, supra,* 680 F.2d at 1203; *United States v. Winter,* 663 F.2d 1120, 1136 n.25 (1st Cir. 1981).

Both Massa and Skinner facilitated and benefited from the illegal activity at the heart of the conspiracy: the manipulation of the ten margin accounts at Stix. Massa ostensibly owned two of the accounts and borrowed money on the fraudulent collateral for his own personal use. His purchase of a controlling interest in Stix, with money embezzled from the firm, allowed larger amounts of money to be siphoned off the fraudulent accounts, as did the fictitious subordinated loans he arranged. Although Skinner did not have a Stix account, he fronted corporations funded by money embezzled from the accounts. Massa was an officer and shareholder in most of these corporations. Skinner also, at least on one occasion, helped Janice Brimberry obtain blank securities that were later forged and placed in the Stix vault. They were thus both intimately connected to the looting phase of the conspiracy.

Massa and Skinner also worked together with the other participants in the scheme to conceal its fruits from the IRS and other governmental agencies. Massa extended Brimberry a "loan" from stolen Stix money to disguise the source of the funds used to build the Brimberry mansion. Skinner helped to launder other Stix funds so that they could not be traced to Brimberry. In addition, Skinner prepared Massa's income tax during the years of the conspiracy, knowingly and consistently misrepresenting the extent and source of Brimberry's wealth.

We conclude that there was no variance between the single conspiracy alleged in the indictment and the proof at trial. The government charged one overall agreement to loot Stix and conceal the scheme. We decline the defendants' invitation to divide artificially this single scheme into separate conspiracies for each phase and each participant. Because we find no variance, it is unneces-

sary to address the prejudice prong of the defendants' arguments.

2. Brimberry's Out-of-Court Statements.

Thomas Brimberry did not testify at the trial of Massa and Skinner, but his out-of-court statements were admitted through the testimony of other principals in the scheme —Janice Brimberry, Maeras and Miller. Both Skinner and Massa challenge the admission of these statements based on Fed. R. Evid. 801(d)(2)(E) and the confrontation clause of the sixth amendment.

a. Rule 801(d)(2)(E).

Coconspirator statements are admissible under Fed. R. Evid. 801(d)(2)(E) if a preponderance of the independent evidence demonstrates that they were made during the course and in furtherance of a conspiracy to which the defendant and the declarant were parties.[4] *United States v. Nelson*, 603 F.2d 42, 44 (8th Cir. 1979); *United States v. Bell*, 573 F.2d 1040, 1043 (8th Cir. 1978). Skinner argues that Brimberry's coconspirator statements should have been excluded because they were not made in furtherance of the conspiracy.[5] We disagree. This requirement for admissibility is afforded broad construction. *E.g.*,

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4. Rule 801(d)(2)(E) provides:

(d) Statements which are not hearsay. A statement is not hearsay if—

* * * *

(2) Admission by party-opponent. The statement is offered against a party and is * * * (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

5. Skinner also contends that the trial court did not make the explicit ruling on the record required by *United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978). The trial court did, however, make this ruling, both at the end of the government's case and at the end of trial. (11 Tr. 28, 29; 12 Tr. 157)

United States v. Bentley, 706 F.2d 1498, 1506 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 2397 (1984); *United States v. Harris*, 546 F.2d 234, 237-238 (8th Cir. 1976). Skinner has not cited an example of any of Brimberry's statements that did not further the goals of the conspiracy, and we have not found any in our search of the record. All of the admitted statements were made to other participants in the scheme and either explain events important to the conspiracy or give directions to facilitate it. We therefore reject Skinner's Rule 801(d)(2)(E) argument for excluding these statements.

Massa contends these statements should not have been admitted against him under the federal rules because there was insufficient independent evidence that he was a part of the conspiracy. He specifically maintains the government did not show he knowingly participated in the conspiracy. As discussed in a later section, we believe the government did prove beyond a reasonable doubt that Massa was a knowing participant. To satisfy Rule 801(d)(2)(E), however, the government did not have to show Massa's connection to the scheme beyond a reasonable doubt, but only by a preponderance of the independent evidence. We think the independent evidence presented was more than sufficient to meet this standard. Documentary evidence and stipulations showed that $7 million worth of securities in Massa's accounts were fraudulent, that Massa obtained $2.5 million of Stix's money for his own use, and that Massa used money withdrawn from the Stix margin accounts to buy controlling interest in Stix. This documentary evidence, together with testimony linking Massa to the fraudulent subordinated loans, satisfies the preponderance of the evidence standard. We therefore hold these statements were admissible under the federal rules.

b. The Confrontation Clause.

Even if Brimberry's statements were admissible under the federal rules, Skinner and Massa argue their admission violated the right to confrontation contained in the sixth amendment. For support, they rely primarily on the Supreme Court's decision in *Ohio v. Roberts,* 448 U.S. 56 (1980). *Roberts* held that

> when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. at 66 (footnote omitted).

The defendants in the instant case contend that the trial court should have excluded Brimberry's statements because neither of the *Roberts* criteria was met: Brimberry was available to testify and his hearsay statements were unreliable.

The first question is whether the *Roberts* requirements apply to the admission of coconspirator statements or whether, as the government argues, availability and reliability are only requisites when the prosecution seeks to introduce prior testimony from a preliminary hearing—the exact factual circumstances in *Roberts.* It is clear that the *Roberts* Court sought to establish an approach to confrontation clause issues applicable to a range of cases beyond the particular facts before the Court at the time.

The Court stated that it had been called upon "to consider once again the relationship between the Confrontation Clause and the hearsay rule with its *many* exceptions." *Id.* at 62 (emphasis added). It noted that the confrontation clause read literally would abrogate all hearsay exceptions, but that the Court had historically sought to reconcile the sixth amendment interest in face-to-face confrontation and right to cross-examination with the interests in law enforcement and precise evidentiary rules which underly the hearsay exceptions. *Id.* at 63-64. These competing interests are implicated no matter what hearsay exception is used to justify the admission of an out-of-court statement. Consequently, the *Roberts* requirements apply to a broad range of cases.

Nor is there any reason to specifically exclude coconspirator statements from *Roberts* requisite showing of unavailability and reliability. While it is true that *Roberts* specifically addressed hearsay *exceptions*, the same interest in face-to-face confrontation is at stake when the out-of-court statements of coconspirators are admitted as *non-hearsay* under the agency theory of Fed. R. Evid. 801(d)(2)(E). Indeed, coconspirator statements may be more in need of scrutiny under the confrontation clause precisely because, unlike hearsay exceptions, they are not admissible because of their inherent reliability. *See United States v. Ammar*, 714 F.2d 238, 255-256 (3d Cir.), *cert. denied*, 104 S. Ct. 344 (1983); Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv. L. Rev. 1378, 1385-1391 (1972). Thus, the Ninth, Third and Fifth Circuits have all analyzed confrontation clause challenges to the admission of coconspirator statements using the requisites of unavailability and reliability set forth in *Roberts*. *See United States v. Arbelaez*, 719 F.2d 1453,

1460 (9th Cir. 1983); *United States v. Ammar, supra,* 714 F.2d at 255; *United States v. Peacock,* 654 F.2d 339, 349 (5th Cir. 1981).

The second question then is whether the *Roberts* requirements were met in this case. We turn first to the defendants' contention that Brimberry's statements were not reliable. Initially, we note that the coconspirator rule is not "a firmly rooted hearsay exception" from which "reliability can be inferred without more." *See Ohio v. Roberts, supra,* 448 U.S. at 66. The Federal Rules of Evidence categorize coconspirator statements along with admissions as "[s]tatements which are not hearsay." Fed. R. Evid. 801(d)(2). Admissions are not admitted because of confidence in their inherent reliability; rather, they are admitted because "a party will not be heard to object that s/he is unworthy of credence." *United States v. Ammar, supra,* 714 F.2d at 255; McCormick, *Handbook of the Law of Evidence* § 262 at 628-629 (2d ed. 1972). Thus, the confrontation clause inquiry is not equivalent to the Rule 801 inquiry.

Factors relevant to determining reliability include: (1) whether the context of the statements and the persons to whom they were made suggest that they were reliable; (2) whether the declarant had a motive for lying or problems with his or her memory, perception or expression; and (3) whether the declarant had personal knowledge of the identity and role of the participants in the crime. *United States v. Ammar, supra,* 714 F.2d at 256; *United States v. Kiefer,* 694 F.2d 1109, 1113 (9th Cir. 1982); *United States v. Perez,* 658 F.2d 654, 661 (9th Cir. 1981).

Although the Brimberry's out-of-court statements were made from personal knowledge and in furtherance of the conspiracy and were corroborated by other evidence,

we agree with the defendants that Brimberry's behavior after the scheme was discovered casts doubt on the reliability of any of his statements. Brimberry originally made a deal to testify for the government. He allegedly lied to the grand jury, however, and the deal was voided. He was subsequently indicted for obstruction of justice and making false statements. The government does not contest the defendants' assertion that it did not call Brimberry to testify precisely because he was unreliable. Brimberry's penchant for lying no matter what was at stake, may be the type of unusual circumstance which would require the exclusion of his out-of-court statements under the confrontation clause despite their admissibility under Rule 801(d)(2)(E).

The record also raises serious questions about Brimberry's availability. The government recognized on the record that Brimberry had offered to testify.[6] In *Roberts*, the Supreme Court stated "if there is a possibility, albeit remote, that affirmative measures might produce the

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6. This raises the additional question, not pressed by the government in its brief, of whether the confrontation clause prevents the use of hearsay statements when the declarant is available to both sides. Two Ninth Circuit pre-*Roberts* cases imply that it does not: *United States v. Weiner*, 578 F.2d 757, 771 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978) (declarant actually called by defense but he asserted fifth amendment privilege); *United States v. Snow*, 521 F.2d 730, 736 (9th Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976) (no need to call witness equally available to both sides).

We read *Roberts*, however, to place the burden on the government to make available for cross-examination a witness whose out-of-court statements it is using against the defendant. The Court stated: "[A] witness is not 'unavailable' for purposes of . . . the exception to the confrontation requirement unless the prosecutorial authorities have made a *good faith effort* to obtain his presence at trial * * *." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (citations omitted; emphasis in original). Thus, it is the government's burden to obtain the available hearsay declarant's presence at trial, although it need not call the witness to testify. *Id.* at 66.

declarant, the obligation of good faith *may* demand their effectuation." *Ohio v. Roberts, supra,* 448 U.S. at 74 (emphasis in original). Thus, the government may have been obligated to make Brimberry available for cross-examination in order to use his out-of-court statements in conformity with the confrontation clause.

Notwithstanding the doubts expressed above, we need not decide the propriety of admitting Brimberry's statements because we believe any error was harmless beyond a reasonable doubt. *See United States v. Hastings,* 103 S. Ct. 1974, 1980 (1983); *Schneble v. Florida,* 405 U.S. 427, 432 (1972); *Harrington v. California,* 395 U.S. 250, 253 (1969). Both defendants claim Brimberry's out-of-court statements prejudiced them, but only Massa offers an example. Coconspirator Miller testified that when he threatened to go to the IRS and Stix with information, Brimberry told him he would get Massa, Maeras, Brimberry and others in trouble. According to Massa, grouping him with these other clearly guilty parties in this context severely prejudiced his case. We do not agree.

Other reliable, nonhearsay evidence linked Massa to these three men and the fraud at Stix. Documentary evidence showed Maeras, Miller and Massa were the purported owners of the padded margin accounts at Stix. In addition, the other coconspirators testified from personal experience about Massa's involvement. For example, Janice Brimberry's testimony linked Massa to the fraud itself and to Brimberry. She testified that she typed Massa's name on blank stock certificates and that she and Tom Brimberry received a $250,000 check from Massa for their mansion in Granite City. Maeras testified that Massa told him to forge A. E. Shaw's name on the bogus loan documents out of the sight of his secretary. Miller attended meetings with Maeras, Massa and Brimberry at Miller

Excavating, a corporation fronted by Skinner and funded with embezzled Stix funds. When viewed in the context of all of the evidence tying Massa to the Stix fraud and to the other conspirators, the statement that Miller would get Maeras, Miller and Brimberry in trouble by going to the authorities is hardly damaging enough to require reversal.

Our review of the record reveals that the other out-of-court statements attributed to Brimberry were not harmful to either Massa's or Skinner's defenses. Maeras testified that Brimberry directed him to make cashier's checks payable to Massa from the false Stix accounts. This testimony did not involve hearsay because Brimberry's statements were not offered for the truth of the matter asserted, but rather as Maeras's explanations for his own action. Maeras himself could be cross-examined on that point. Janice Brimberry testified that Thomas Brimberry told her Massa would loan them $250,000 for their home and that Brimberry and Massa arranged to buy stock together at Stix registered in Massa's name. Other nonhearsay evidence also established these facts and the defense did not dispute them. Instead, it maintained that Massa did not know Brimberry was running a scheme to loot Stix. Aside from the statement discussed above, Miller did not relay any statements made by Brimberry which implicated Massa or Skinner or added anything new to other evidence of their involvement in the scheme. Thus, a review of the testimony of the three coconspirators demonstrates that the admission of Brimberry's statements if erroneous was harmless beyond a reasonable doubt.

To summarize, we hold Brimberry's out-of-court statements were admissible under rule 801(d)(2)(E). While Brimberry's reliability and unavailability may not have

been established to the satisfaction of the confrontation clause, we hold any error in this regard to be harmless beyond a reasonable doubt.

B. Massa's Arguments.

In addition to the above issues, which Massa and Skinner both raise, Massa challenges the sufficiency of the evidence against him. Specifically, he contends the government has failed to prove the requisite criminal intent. He also maintains the jury convicted him despite the government's failure of proof because the court improperly instructed the jury that Massa's knowledge of the scheme could be inferred from his willful blindness. The prejudicial effects of this instruction was aggravated, Massa argues, by the government's reliance on it during final argument. We disagree with these contentions.

1. Sufficiency of the Evidence.

Massa's entire sufficiency of the evidence argument hinges on the assertion that the government had to prove he knew how Brimberry embezzled the money from Stix in order to convict him of participation in the scheme. According to Massa, the "essential nature" of the conspiracy was the agreement to manipulate the fictitious security positions in the ten accounts at Stix. Because the government produced no direct evidence that Massa knew of, or participated in, the creation or manipulation of these accounts, Massa argues he should not have been convicted of conspiracy. Furthermore, he maintains the substantive counts must also fail because they all presuppose his knowledge of the specifics of Brimberry's scheme.

We think the evidence was sufficient for the jury to infer that Massa at least knew that his own margin ac-

counts at Stix were being padded with false collateral. Janice Brimberry testified that she typed forged collateral for Massa's account as early as 1976. Massa, a sophisticated investor who kept records of his accounts, received monthly statements showing this false collateral. When the scheme was discovered, his account had been padded with over $7 million worth of fictitious securities. Although he invested only $60,000 in the account, he withdrew over $2.5 million from it during the course of the scheme. He explained his miraculous acquistion of capital as due simply to Brimberry's largess. Moreover, when the fraud was uncovered, the president of Stix called Massa in Las Vegas to tell him that millions of dollars in securities were missing. Massa reacted without concern and never returned to the firm. In our view, the evidence was sufficient for the jury to conclude that Massa knew the accounts Brimberry managed at Stix were padded with false collateral.

Moreover, we think the essential nature of the conspiracy was broader than the scheme to manipulate the margin accounts; the goal was to embezzle money from Stix using a variety of strategies and hide the attendant wealth. The evidence shows Massa was deeply involved in this overall scheme. Using money embezzled from the margin accounts, Massa bought controlling interest in Stix. He used his power to place Brimberry in absolute control of the margin accounts and the flow of cash from the firm, telling senior officers at Stix to follow Brimberry's orders at the risk of being fired. Thereafter, the amount of money taken from the firm increased substantially. When the firm's independent auditors seemed to be on the verge of discovering the fraud, Massa told Brimberry to "fire the auditors." Massa also caused subordinated loans to be made to Stix which were actually funded with money stolen from Stix. The purpose of

the loans was to increase the capital of the firm, allowing the conspirators to embezzle more money, while avoiding detection by the regulatory authorities. Thus, there was ample evidence for the jury to find Massa knew of, and participated in, the overall scheme to loot Stix.

We see no need to recount all of the evidence tending to support the various counts in the indictment. Massa for the most part limited his challenge to the government's alleged failure to prove he knew of Brimberry's manipulation of the margin accounts at Stix.[7] Because we find the evidence more than sufficient to prove Massa knowingly participated in the overall scheme, we reject his challenge.

2. Instructions.

Massa raises two objections to the court's instructions. First, he maintains the court erred in refusing to instruct the jury that the government had to prove Massa possessed actual knowledge of the fictitious securities to be convicted of all counts. As stated above, we do not agree that such an instruction states the government's burden. The jury could find Massa was a knowing participant in

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7. As a sub-issue of sufficiency of the evidence, Massa challenges his conviction on four of the mail fraud counts against him because the act alleged is the mailing of audit confirmation cards from outside auditors to Massa. He argues that these mailings did not further the purposes of the scheme and hence were not unlawful. *See Kann v. United States*, 323 U.S. 88 (1944). We disagree. In order to sustain a charge of mail fraud under 18 U.S.C. § 1341, the government must prove (1) the existence of a scheme to defraud, and (2) the use of the mails for the purpose of executing the scheme. To satisfy the second element, it is enough that the use of the mails could reasonably be foreseen. *United States v. Kaminski*, 692 F.2d 505, 511 (8th Cir. 1982). In the instant case, both the mailing and return of the audit cards furthered the scheme by misleading the independent auditors. Since Massa could have foreseen that audit cards would be sent out on his fictitious accounts, he caused the mailings for purposes of the statute. Thus, the two elements of the charge were proven.

the Stix fraud without finding he knew exactly how Brimberry withdrew money from the firm. Thus, the trial court did not err in refusing to give this instruction.

Second, Massa objects to the following instruction which the trial court gave to the jury:

> The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of a fact.
>
> It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

Massa contends this instruction allowed the jury to convict on an objective or "should have known" theory, instead of the subjective knowledge theory required in criminal cases.

Several circuits, including our own, have approved similar instructions which allow the jury to infer the element of knowledge from deliberate indifference. *United States v. Kershman,* 555 F.2d 198, 200 (8th Cir.), *cert. denied,* 434 U.S. 892 (1977); *United States v. Jewell,* 532 F.2d 697, 700 (9th Cir.), *cert. denied,* 426 U.S. 951 (1976); *United States v. Dozier,* 522 F.2d 224, 226-227 (2d Cir.), *cert. denied,* 423 U.S. 1021 (1975); *United States v. Thomas,* 484 F.2d 909, 912-914 (6th Cir.), *cert. denied,* 414 U.S. 912 (1973). In these circumstances, this instruction was par-

ticularly appropriate because both defendants testified that they did not know of the scheme to defraud Stix, in the face of strong evidence to the contrary. Moreover, jury instructions are to be construed as a whole. *E.g., United States v. Rabbitt,* 583 F.2d 1014, 1024 (8th Cir. 1978), *cert. denied,* 439 U.S. 1116 (1979). The jury was repeatedly instructed that it could not find Massa guilty unless it found beyond a reasonable doubt that Massa specifically intended his actions.[8] Given this context, we find no merit

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8. Instruction number 18 provided:

An act is done "knowingly" if done [voluntarily] and intentionally, and not because of mistake or accident or other innocent reason.

The purpose of adding the word "knowingly" is to insure that no one will be convicted for an act done because of mistake, or accident, or other innocent reason.

Instruction number 19 provided:

An act is done "willfully" if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

Instruction number 36 provided:

The crime charged in this case is a serious crime which requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent, the Government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

Instruction number 44 provided:

The words "scheme, tricks and device" must be considered together with the words "knowingly" and "willfully". An act is done "knowingly" if done voluntarily and intentionally and not because of mistake or accident or other innocent reason. An act is done "willfully" if done voluntarily and intentionally, and with specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law. The word "knowingly" is added in order to insure that no one would be convicted because of mistake or accident or other innocent reason.

to Massa's argument that the above quoted instruction was improperly given in this case.

Neither can we agree with Massa's related contention that the government misled the jury in final argument by stating that the defendants' knowledge could be inferred from their willful blindness. The government legitimately relied on this theory given the facts of the case. Nowhere in its final argument does the government state that it did not have to prove knowledge, or that a "should have known" standard suffices. We thus conclude the argument was proper.

We have considered all of the arguments raised by Massa and conclude that (1) no variance exists between the conspiracy charged in the indictment and the proof at trial; (2) it was not reversible error to admit Brimberry's out-of-court statements; and (3) the evidence against Massa is sufficient to sustain his conviction. We thus affirm his conviction on appeal.

C. Skinner's Arguments.

In addition to the arguments he asserts in common with Massa, Skinner contends that the trial court erred in initially ruling that he and Massa should be tried together under Fed. R. Crim. P. 8(b) and thereafter denying his motion for severance under Fed. R. Crim. P. 14. Skinner also maintains that he was deprived of his right to a speedy trial and that the government failed to prove various counts in the indictment. We examine each of these arguments in turn.

1. Misjoinder and Severance.

Rule 8(b) in the Federal Rules of Criminal Procedure balances the right of the accused to a fair trial and the

public's interest in the efficacious administration of justice. *United States v. Zicree,* 605 F.2d 1381, 1386 (5th Cir. 1979), *cert. denied,* 445 U.S. 966 (1980). The rule provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

The propriety of joinder is to be determined from the face of the indictment. *Schaffer v. United States,* 362 U.S. 511, 514 (1960). The factual allegations in the indictment must be accepted as true. *United States v. Zicree, supra,* 605 F.2d 1387. One exception for going behind the allegations on the face of the indictment in deciding whether joinder is proper is if the indictment alleges a single conspiracy, but the facts alleged in the indictment show multiple conspiracies. *United States v. Levine,* 546 F.2d 658, 663 (5th Cir. 1977). The *Levine* Court found misjoinder as a matter of law because the government rested its conspiracy count on the "false legal premise that proof of proximate or simultaneous conspiracies with one common conspirator was sufficient to establish the existence of a single conspiracy." *Id.* at 665.

Skinner urges us to apply the *Levine* rule and find misjoinder in this case because, in his view, the facts alleged in the indictment show multiple conspiracies and schemes even though only one was alleged. We do not agree. As we noted in the section of this opinion discussing the defendants' variance claim, this conspiracy involved subsidiary schemes bound together by one common goal—to defraud Stix and hide the illgotten gains. Because

the indictment on its face alleges one conspiracy involving both Skinner and Massa, joinder was proper under Rule 8(b).

We also find the trial court did not err in denying Skinner's motion for severance under Fed. R. Crim. P. 14. Severance is proper where a defendant demonstrates that a jury could not reasonably be expected to compartmentalize the evidence as it relates to separate defendants. *United States v. Reed*, 658 F.2d 624, 629 (8th Cir. 1981), *cert. denied*, 455 U.S. 1002 (1982). The decision to sever is within the sound discretion of the trial judge and its denial is not subject to reversal unless clear prejudice is shown. *United States v. Schroeder*, 433 F.2d 846, 851 (8th Cir. 1970). We find no such clear prejudice in this case. Skinner has offered no meritorious reason why the jury could not compartmentalize the evidence relevant to him. Accordingly, we conclude the defendants were properly tried together.

2. Sufficiency of the Evidence.

Skinner challenges the sufficiency of the government's evidence on the following counts: Count Twenty-nine which charged him with illegally concealing currency transactions exceeding $10,000 in a single day in violation of 18 U.S.C. § 1001 (1982); Counts Fifteen through Twenty-two which charged him with mail fraud in violation of 18 U.S.C. § 1341 (1982); and Counts Forty through Forty-three which charged him with transportation of forged securities in violation of 18 U.S.C. § 2314 (1982). We find the government's proof sufficient on Counts Twenty-nine and Fifteen through Twenty-two. For the reasons stated below, however, we reverse Skinner's conviction on Counts Forty through Forty-three for the transportation of forged securities.

a. Count Twenty-nine.

Section 1001 prohibits individuals from devising any scheme to conceal or cover up material facts within the jurisdiction of an agency of the government.[9] Federal law requires banking institutions to report the name and address of individuals dealing in amounts of cash in excess of $10,000. Count Twenty-nine alleges that Skinner and others devised a scheme for avoiding this reporting requirement and thus concealing a material fact by going to various banks on a single day and buying cashier's checks for less than $10,000 at each bank. For example, on April 11, 1980, Skinner purchased cashier's checks at nine different banks for a total of $60,000; and on April 30, 1980, he went to five banks and purchased cashier's checks in an amount less than $10,000 for a total of $37,500. Janice Brimberry testified that the purpose of this subterfuge was to avoid detection by the IRS.

Skinner protests that his failure to cumulate the various cashier's checks he "purchased from time to time" states no violation of federal law because the banking regulations put no duty on the taxpayer to assist financial institutions in carrying out their reporting duties. We find no merit in this contention. Skinner's clear purpose was to hide information from the IRS using the device of multiple cash transactions. His conviction on this count was therefore proper.

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9. 18 U.S.C. § 1001 states in its entirety:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

b. Counts Fifteen through Twenty-two.

These counts charge Skinner with mail fraud in connection with the mailing of audit confirmation cards. Four of the counts allege audit confirmation cards were mailed to a post office box in Illinois. The other four counts allege the cards were mailed back to the Stix auditors. The cards were addressed to Arthur Miller, Jr., the ostensible owner of one of the fraudulent accounts at Stix. Skinner received the mail addressed to that account. The cards that were mailed back falsely stated that the accounts were accurate. Skinner argues that these mailings did not violate the mail fraud statute because they were not sufficiently related to the overall scheme and the government failed to prove that Skinner caused these cards to be mailed. We think the evidence was sufficient for the jury to find these mailings constituted mail fraud.

The mail fraud statute prohibits the use of the mails "for the purpose of executing" a scheme to defraud.[10] To come within the statute "[i]t is not necessary that the scheme contemplated the use of the mails as an essential

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10. 18 U.S.C. § 1341 provides:

> Whoever having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

element." *Pereira v. United States*, 347 U.S. 1, 8 (1954). Rather, it is enough if the mailing is "incident to an essential part of the scheme." *Id.*, *quoted in United States v. Lebovitz*, 669 F.2d 894, 896 (3d Cir.), *cert. denied*, 456 U.S. 929 (1982). "Mailings which are designed to lull victims into a false sense of security, postpone inquiries or complaints, or make the transaction less suspect are mailings in furtherance of the fraudulent scheme under the mail fraud statute." *United States v. Tackett*, 646 F.2d 1240, 1243 (8th Cir. 1981). Clearly, the mailings to and from the Stix auditors fit in this category. As we stated previously, a central concern in the scheme was to fool the auditors. The sending and receiving of audit confirmation cards was integral to this concern. Accordingly, the jury could have found the mailings furthered the scheme.

We also find sufficient evidence that Skinner caused the mailings within the meaning of the statute. He need not have personally mailed the cards; it is enough if he committed "an act with knowledge that the use of the mails would follow in the ordinary course of business, or where such use could reasonably be foreseen, even though not actually intended." *United States v. Kaminski*, 692 F.2d 505, 511 (8th Cir. 1982); *Pereira v. United States*, *supra*, 347 U.S. at 8-9. Moreover, once Skinner became a party to the scheme, he could be held accountable for mailings caused by other members, whether or not he knew of or agreed to any specific mailing. *United States v. Wormick*, 709 F.2d 454, 461 (7th Cir. 1983). Here, it could be reasonably foreseen by any participant in the scheme that the Stix auditors would mail audit confirmation cards and they would have to be returned. The causation element is thus satisfied and Skinner's conviction on the mail fraud counts is affirmed.

c. Counts Forty through Forty-three

Counts Forty through Forty-three charged Skinner with the transportation in interstate commerce of "falsely made and forged securities, to wit: certain cashier's checks bearing the forged endorsement of Ron Stone" in violation of 18 U.S.C. § 2314. Because forged endorsements on otherwise valid securities do not make the instruments themselves forged securities under section 2314, we must reverse Skinner's conviction on these counts.[11]

Section 2314 provides in relevant part:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered or counterfeited; * * *
>
> Shall be fined not more than $10,000, or imprisoned not more than ten years, or both.

In *Streett v. United States*, 331 F.2d 151, 157 (8th Cir. 1964), we held that Congress intended in this section to reach only forged securities, not forged endorsements and that, once a security was complete, the addition of a forged endorsement did not serve to make it a forged security. *Accord United States v. Tyson*, 690 F.2d 9, 14 (1st Cir. 1982); *United States v. Sciortino*, 601 F.2d 680, 682-683 (2d Cir. 1979); *United States v. Simpson*, 577 F.2d 78, 81 (9th Cir. 1978).

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11. Our reversal of these counts against Skinner makes it unnecessary for us to consider whether the grand jury testimony of Ron Stone was admissible under Fed. R. Evid. 804(b)(5), another issue raised by Skinner. Stone's testimony was only relevant to these counts.

In 1968, Congress amended section 2314 in response to the *Streett* decision and pressure from the traveler's check industry to specifically prohibit the transportation with unlawful or fraudulent intent in interstate commerce of any traveler's check bearing a forged countersignature, regardless of its value, 18 U.S.C. § 2314 ¶ 4; *see* H.R. Rep. No. 1728, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News, 3654, 3654-3657. Courts considering the 1968 amendment have concluded that Congress intended to overrule the *Streett* principle as to traveler's checks only. *See United States v. Tyson, supra,* 690 F.2d at 13-14; *United States v. Sciortino, supra,* 601 F.2d at 682; *United States v. Simpson, supra,* 577 F.2d at 81. We are inclined to agree. When faced with the *Streett* decision, Congress could have altered paragraph three of section 2314 to specifically include forged endorsements. Instead, it made traveler's checks a specific exception by adding a paragraph covering that type of security. We thus conclude, with our sister circuits, that the provision for forged or falsely made securities set forth in paragraph three excludes all false endorsements not included in paragraph four.[12]

Because Skinner's transportation of cashier's checks with forged endorsements did not constitute transportation of forged or fraudulently made securities, we reverse his conviction on Counts Forty through Forty-three. We agree with the government, however, that the proof offered on those counts was not prejudicial and does not require the reversal of any of Skinner's other counts.

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12. The government might have charged Skinner with a violation of paragraph one of section 2314, which prohibits the knowing interstate transportation of security "converted or taken by fraud" if its value exceeds $5,000. The indictment clearly charged Skinner with a violation of paragraph three, however.

3. Speedy Trial Act.

Skinner's final contention on appeal is that he was deprived of his right to a speedy trial under 18 U.S.C. § 3161 (c) (1982). Although the period of time between Skinner's indictment and trial exceeded the seventy-day time limit in section 3161(c), we are satisfied from our review of the record that the motions of the defendants and the trial court's finding that a continuance was proper under section 3161(h)(8)(A) tolled the limitation period in the Act. We thus find no merit in Skinner's contention that the court did not comply with the Speedy Trial Act.

Thus, after considering the various arguments Skinner has raised on appeal, we affirm his conviction on all counts except Counts Forty through Forty-three.

III. CONCLUSION.

We affirm Massa's conviction on all counts. Viewing the evidence in a light most favorable to the jury's verdict, it is clear that Massa knowingly participated in the single overall conspiracy to defraud Stix and hide the proceeds. Skinner's conviction is affirmed in part and reversed in part. We find the evidence sufficient on all but the transportation of forged securities counts.

Accordingly, the judgment is reversed in part and affirmed in part.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1756-EM

UNITED STATES OF AMERICA
Appellee,

vs.

JAMES MASSA,
Appellant.

On Appeal From the United States District Court
For the Eastern District of Missouri,
Eastern Division

PETITION FOR REHEARING AND/OR SUGGESTION FOR PETITION FOR REHEARING EN BANC

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AFFIDAVIT

STATE OF MASSACHUSETTS)
) ss.
COUNTY OF SUFFOLK)

NOW COMES Daniel Patrick Leonard, having been duly sworn, and states under oath as follows:

1. That he is an attorney of record for Appellant James Massa.

2. That it is his belief, based on a reasoned and studied professional judgment, that the decision of the Court in the instant case is contrary to the following decisions of the United States Court of Appeals for the Eighth Circuit and the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court:

Chapman v. California, 386 U.S. 18 (1967);
Harrington v. California, 395 U.S. 250 (1969);
United States v. Green, 600 F.2d 154 (8th Cir. 1979);
United States v. Smith, 578 F.2d 1227 (8th Cir. 1978).

/s/ Daniel Patrick Leonard
Daniel Patrick Leonard

SUBSCRIBED AND SWORN to before me, a Notary, this 27th day of August, 1984.

/s/ Karen A. Stout
Karen A. Stout, Notary
My Commission Expires:
11/15/85

PETITION FOR REHEARING AND/OR SUGGESTION FOR PETITION FOR REHEARING EN BANC

Defendant-Appellant, James Massa, by and through counsel, respectfully petitions this Honorable Court for a rehearing or a rehearing *en banc* of its decision affirming Defendant's conviction, *United States v. Massa*, 83-1756, August 6, 1984, and as grounds therefor states as follows:

1. A panel of this Court failed, in determining that the admission of the hearsay statements of Thomas Brimberry was harmless error, to apply the "overwhelming evidence" standard set forth in *Chapman v. California*, 386 U.S. 18 (1967), and *Harrington v. California*, 395 U.S. 250 (1969), and their progeny including decisions of this Circuit. *United States v. Roth*, 736 F.2d 1222, 1226 (8th Cir. 1984); *United States v. Green*, 600 F.2d 154, 158 (8th Cir. 1979); *United States v. Smith*, 578 F.2d 1227, 1239 (8th Cir. 1978) (Lay, C.J., concurring).

2. Assuming *arguendo* that the proper harmless error standard was applied, the panel erred in failing to properly consider the effect of all of the tainted hearsay statements.

3. The panel erred in finding that the "guilty knowledge" instruction given by the District Court below was proper in light of the circumstances of the case. The approval of said instruction by the panel, in the context in which it was given, is not supported by any precedent in this or any other Circuit, or in the United States Supreme Court.

4. The panel's determination as to the sufficiency of the evidence as to the element of knowledge was erroneous and based, in part, on facts not supported by the record.

In addition, the panel misconstrued precedent of the Supreme Court of the United States and this Circuit in its identification of the "essential nature" of the alleged conspiracy. *Blumenthal v. United States,* 332 U.S. 539, 557 (1947); *United States v. Pintar,* 630 F.2d 1270, 1276 (8th Cir. 1980).

5. The panel failed to address the issue of the admissibility of the opinion testimony of government witness William Gaynor.

I. *The Court Failed to Apply the Proper Standard in Determining That the Admission of the Hearsay Statements of Thomas Brimberry Was Harmless Error*

In addressing the issue of the applicability of the Sixth Amendment's Confrontation Clause criteria set forth in *Ohio v. Roberts,* 448 U.S. 56 (1980), to the admission of the co-conspirators' hearsay statements of Thomas Brimberry (hereinafter referred to as "Brimberry"), this Court was faced with a question of first impression in this Circuit. While the question was apparently answered in favor of the Appellant, the panel denied him the benefit of its new rule by determining that any error in admitting Brimberry's statements was harmless. It is respectfully submitted that the panel's finding of harmless error in this regard was erroneous because it was based on a standard considerably less stringent than that mandated under controlling Supreme Court and Eighth Circuit cases. *See Chapman v. California,* 386 U.S. 18 (1967); *Harrington v. California,* 395 U.S. 250 (1969); *United States v. Roth.* 736 F.2d 1222, 1226 (8th Cir. 1984); *United States v. Smith,* 578 F.2d 1227 (8th Cir. 1978). Thus, the panel's

decision is in direct conflict with established precedent. Moreover, even assuming *arguendo* that the panel applied the proper standard, it failed to consider the detrimental effect of several tainted hearsay statements and underestimated the prejudice caused by the statements which were considered.

In *Chapman v. California,* 395 U.S. 250 (1967), the Supreme Court enunciated the standard which was to guide courts in their determination as to whether constitutional errors at trial are of such insignificance that reversal is not required. Essentially the Court in *Chapman* found that only if a reviewing court can declare a belief that the error complained of was harmless, *i.e.,* "that the error . . . did not contribute to the verdict", beyond a reasonable doubt, can the conviction stand. *Id.* at 24.

In further defining this standard, the Supreme Court has developed a test which is to be applied in assuring that the stringent guideline envisioned by the Court in *Chapman* is followed. This test began to take shape in *Harrington v. California,* 395 U.S. 250 (1969), a case in which the Supreme Court applied the harmless error doctrine to a confrontation clause violation. In *Harrington,* a case involving the admission of co-defendants' confessions in violation of *Bruton v. United States,* 391 U.S. 123 (1968), the Court focused on two primary factors in making its harmless error determination: 1) the purely cumulative nature of the tainted evidence; and 2) the "overwhelming" independent evidence of the defendant's guilt. *Id.* at 254.

In *Schneble v. Florida,* 405 U.S. 427 (1972), a case involving a *Bruton* violation, the Supreme Court again

relied on the dual factors identified in *Harrington*—the Court in *Schneble* found that the co-defendant's statements were merely corroborative of certain details of the defendant's own properly admitted confession and that the independent evidence of the defendant's guilt was overwhelming. *Id.* at 1059.

More recently, in *United States v. Hastings,* ..... U.S. ....., 103 S.Ct. 1974 (1983), the Supreme Court again applied the two-pronged test to a case involving improper prosecutorial comment on the defendant's failure to rebut certain evidence. While relying most heavily on the "overwhelming evidence" prong of the test in finding that the error was harmless, *id.* at 1982, the Court as a whole was obviously influenced by the close question of whether the comments were, in fact, improper. *Id.* at 1982-83 (Stevens, J., concurring).

The above-discussed cases make clear that a reviewing court faced with the question of whether the harmless error doctrine is applicable in a situation where evidence has been admitted in violation of the confrontation clause must engage in a two-part analysis. The court must first determine if the evidence of guilt independent of the tainted evidence is overwhelming. If it is not, the conviction must be reversed. Even if the evidence of guilt is deemed to be overwhelming, the evidence must be examined to determine whether it is merely cumulative or had but a slight effect on the jury.

This two-level test has been recognized and applied, at least implicitly, by other panels of this Circuit. *See United States v. Roth,* 736 F.2d 1222, 1226 (8th Cir. 1984);

United States v. Green, 600 F.2d 1541, 1548 (8th Cir. 1979); *United States v. Smith*, 578 F.2d 1227 (8th Cir. 1978).[1]

It is respectfully submitted that the panel of this Court rendering the opinion in the case at bar failed to apply the two-pronged test developed by the Supreme Court and adhered to in this Circuit. In particular, the panel did not make a finding as to the overwhelming nature of the independent evidence of guilt of Appellant. Instead, the panel chose to evaluate a handful of the numerous hearsay statements in terms of their possible prejudicial effect on the Appellant. This is clearly not the type of in-depth analysis envisioned by the controlling decisions discussed above. Perhaps most importantly, the panel's analysis clearly places the burden on the Appellant to prove that the unconstitutionally admitted statements were prejudicial.[2] This result is in direct conflict with the basic

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1. In *Roth, supra*, the Court noted that the "overwhelming evidence of guilt" and the fact that the Government did not emphasize the evidence in question (co-conspirators guilty plea) allowed the application of harmless error doctrine. *Id.* at 1226. Likewise, in *Green, supra*, the Court relied on the "overwhelming amount of evidence" against defendant in finding the admission of inadmissible hearsay to be harmless. *Id.* at 1581. Finally, in *Smith, supra*, Chief Judge Lay, in a concurring opinion, explicitly identified both of the salient factors discussed above. Judge Law found that the tainted co-defendants' statements were not "merely cumulative" and that "no overwhelming independent evidence of guilt" was presented. *Id.* at 1237, 1239.

2. The panel stated at page 17 of its opinion, for example:

> Both defendants claim Brimberry's out-of-court statements prejudiced them, but only Massa offers an example. Co-conspirator Miller testified that when he threatened to go to the IRS and Stix with information, Brimberry told him that he would get Massa, Maeras, Brimberry and others in trouble. According to Massa, grouping him with these other clearly guilty parties in this context severely prejudiced his case. We do not agree.

principle set forth in *Chapman* and prior decisions. *See Fahy v. State of Connecticut*, 375 U.S. 85 (1963), that the beneficiary of a constitutional error has the burden of proving beyond a reasonable doubt that it did not contribute to the verdict.[3] *Id.* at 24; see 1 Wigmore, Evidence Sec. 21 (3d ed. 1940).

Assuming that the panel utilized the correct standard in its harmless error analysis, its conclusion was clearly erroneous. Initially, it should be noted that the hearsay statements discussed in the panel's opinion do not represent the full extent of those admitted at trial. In fact, the panel failed to even address the statement identified by the Government at oral argument as most damaging, *i.e.*, Brimberry's statement to his wife, Janice, that the purpose of the $250,000 loan from Massa was to hide the financing of the construction of a new home from the IRS and that a note would be available in case it was needed for the IRS. (Tr. II p. 128) This statement is significant because it is the only direct testimony which allows the inference, albeit strained, to be drawn that Massa knew of and agreed to help Brimberry hide the money obtained from Stix.[4] The panel in its harmless error discussion mentioned only the first part of the statement—that the loan was made by Massa—correctly noting that this fact was undisputed and fails to consider the damaging portion—that the purpose of the loan was to hide money and that a note would be available if needed—of the statement which, of course, was disputed by Massa in his testimony. (Tr. XI p. 127)

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3. In this regard, it should be noted that the Government did not attempt in its brief to prove that the error was harmless beyond a reasonable doubt.

4. The Government cited this statement twice in support of its argument that Massa was a member of the alleged conspiracy. Brief of Appellee, at 20, 28.

Similarly, the panel did not fully consider the impact of Brimberry's statements to his wife and to co-conspirator Jerry Maeras that Massa and he were splitting the Stix stock "50/50". (Tr. II p. 153, VI p. 84) The fact that Brimberry and Massa allegedly split the Stix stock was used extensively by the Government in its argument to the jury. Specifically, the prosecution argued that it was this joint ownership of the stock which provided Brimberry with the "strings" to control Massa so that Massa would, in turn, act as Brimberry's "front" at Stix. (Tr. XIII p. 15-21) Again, there is no other direct evidence of the joint ownership of Stix stock, and contrary to the panel's assertion, Massa in his testimony directly disputed this fact. (Tr. XI p. 113)

The panel did not consider two other hearsay statements of Brimberry which again provided direct evidence of Massa's knowing participation in the alleged scheme. James Hamer, a former stock clerk at Stix, testified for the Government that Brimberry told him that Massa had "picked" Brimberry to run the "back office" operations at Stix. (Tr. V p. 164) Hamer further testified that Brimberry told him that he had been instructed by Massa not to use certain securities for loan purposes, but to keep them under his control. (Tr. V p. 167) Both of these out-of-court assertions were disputed by Massa and both were key elements in the prosecution's circumstantial proof of Massa's knowing participation in the scheme.[5] While there was some corroboration of the former statement, the latter was totally uncorroborated.

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5. The Government relied on Massa's "promotion" of Brimberry in its arguments to the jury and to this Court. (Tr. XIII p. 19; Brief of Appellee at 5) The panel cited it as a fact leading to the inference that Massa knew of the scheme. *Opinion*, at 20.

The fact that all of the above-discussed assertions were disputed by Massa in his testimony raises an element of prejudice which has been recognized by other panels of this Circuit and other Circuits. These courts recognize that inadmissible hearsay is especially damaging when it directly effects the credibility of the defendant who takes the stand and the defense which he presents. *Cf. United States v. Yow*, 465 F.2d 1328 (8th Cir. 1972); *United States v. Smith*, 578 F.2d 1227, 1239 (8th Cir. 1978) (Lay, C.J., concurring); *United States v. DiRodio*, 565 F.2d 573, 576 (9th Cir. 1977). This notion stems from the inherent unfairness of compelling a defendant to testify, with the attendant exposure and risk, in order to answer the assertions of an individual who is not subject to cross-examination and who does not stand "face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief". *Mattox v. United States*, 156 U.S. 237, 242 (1895). Of course, the basic unfairness is amplified in the instant case where the "hidden" declarant, Brimberry, is the alleged mastermind of a scheme in which Massa has denied knowing participation. Basic human nature dictates that, given the central importance of Brimberry as emphasized throughout the entire case from indictment to final argument, reasonable jurors must have placed considerable emphasis on his assertions as related by third parties. In view of this, the panel's dimunition of the effect of Brimberry's hearsay statements is, with respect, erroneous.

On the other hand, the independent evidence of Massa's knowing participation in the alleged conspiracy was far from "overwhelming",[6] and was entirely circum-

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6. At the time of Massa's motion for a directed verdict, the trial judge stated that "the Government's case passes muster, albeit not mightily" (Tr. XI p. 28), and that it was not the strongest one had seen. (Tr. XI p. 25)

stantial. *See Harrington v. California, supra* (the Court in *Harrington* was careful to point out that the case against the defendant was not "woven from circumstantial evidence". *Id.* at 254).

II. *The Panel Misconstrued the Pleadings and Record Below in Finding that the Jury Could Properly Return a Guilty Verdict Without Finding that Appellant Massa Knew of the Manipulation of the Stix Accounts*

In rejecting Massa's contention that his conviction was improper because there was patently insufficient evidence presented below to prove that he knew of the "essential nature" of the conspiracy charged, the panel has radically redefined the substantive law of criminal conspiracy and altered long-established notions of pleading and proof essential to our system of criminal jurisprudence. The result of the panel's decision is to condone precisely the type of "loose practice" which was condemned long ago by the Supreme Court. *See Krulewitch v. United States,* 336 U.S. 440, 445-446 (1949).

The essence of Massa's claim is that the Government has been permitted in this case, from the drawing of the indictments through its supplemental submissions to this Court, to argue that it can sufficiently prove that Massa was a participant in a scheme to unlawfully obtain money from Stix without having to prove Massa's knowledge of the "essential nature" of the scheme: the manipulation of the accounts at Stix.

The Government argued at trial that it did not have to prove that Massa knew of the account manipulation or that there were fraudulent securities in the accounts. Likewise, the panel found that such proof was not neces-

sary because the essential nature of the alleged conspiracy was broader than the manipulation of the accounts for illicit gain; it was to "embezzle money from Stix using a variety of strategies and to hide the attendant wealth". *Opinion*, at 20. Yet the indictment, which is the focal point of any prosecution and the touchstone of any subsequent appellate review, alleges no such multi-faceted scheme, nor was it intended to. The sole conduit for the flow of funds from Stix was the creation of false securities positions on the ten margin accounts. The panel failed to identify any of the other strategies by which money was taken from Stix. The actions of Massa which the panel identified in discussing the "broader scheme" all directly depend on the manipulation of the accounts. For example, obtaining control of Stix and increasing its capital are only significant insofar as they facilitated the manipulation of the accounts. The same can be said of virtually every overt act attributed to Massa or any of the other co-conspirators.

The panel, by accepting the Government's definition of the essential nature of the scheme, *i.e.*, to steal from Stix and hide the money, is overlooking the basic principle that the prosecution must prove what it pleads. *E.g.*, *United States v. Bufalino*, 285 F.2d 408, 419 (2nd Cir. 1960). The Government could have drafted the indictment to allege the broad scheme described by the panel. It did not. The scheme alleged in the indictment, as the panel noted in its discussion of the variance issue, had at its "heart . . . the manipulation of the ten margin accounts at Stix". *Opinion*, at 10. Counsel for the Government also recognized this central fact in its last submission to this Court, stating that "[b]oth sides agreed that the key issue relating to Massa was whether he knew that there was stock in his accounts that did not belong to either

himself or Tom Brimberry". *Government's Memorandum Relating to Jury Instructions and Theory of the Government's Case in United States v. Massa,* at 5. In light of this, it is indeed anomalous for the panel to find that Massa's knowledge of the account manipulations was something which the Government did not have to prove. Of course, any attempt to determine the sufficiency of the evidence on this fact, including this panel's, is meaningless in view of the Government's repeated assertions before the jury that they did not have to prove it. No reviewing court should allow a verdict based on such improper argument to stand.

In summary, the panel erred in finding that the "essential nature" of the conspiracy alleged was broader than the scheme to manipulate the accounts at Stix. While, strictly speaking, the overall scheme may have encompassed peripheral activities which did not directly involve the manipulation of the accounts, it revolved around, and depended for its success on, this central activity. Moreover, the panel's extremely broad analysis has greatly expanded the concept of the essential nature of conspiracy as it has been defined by the Supreme Court and this and other Circuits, *Blumenthal v. United States,* 332 U.S. 539 (1947); *United States v. Pintar,* 630 F.2d 1270 (8th Cir. 1980), and has resulted in a violation of Appellant's right under the Fifth Amendment to the United States Constitution to be convicted only of the offenses charged in the indictment.

Moreover, the panel's discussion of the evidence which points to the inference of Massa's knowledge of the "overall scheme" contains several factual assertions which are not supported by the record. A listing of these faulty assertions is contained in the Appendix attached hereto.

III. *The Panel Erred in Finding that the Guilty Knowledge Instruction was Properly Given at the Trial Below*

In condoning the use of the "conscious avoidance" or "guilty knowledge" instruction, as given below[7] in the context of the instant case, the panel has misconstrued controlling precedent which has established a strict limitation on the use of said instruction. In *United States v. Jewell,* 532 F.2d 697, 700 (2nd Cir. 1976), the court noted that the exception to the actual knowledge requirement which has come to know as "willful blindness" is "strictly limited" to those circumstances where an individual acts with "an awareness of the high probability of the existence of the fact in question". *See also,* Model Penal Code, Section 2.02(7). Mindful of this strict limitation, courts have only been willing to allow such a theory to be presented in cases which involve the inference of knowledge of simple and obvious facts, or more complex facts or circumstances where the individual to whom knowledge is attributed possesses specialized information. *See, e.g., United States v. Dozier,* 522 F.2d 224 (2nd Cir. 1975) (involving aiding and abetting the possession of controlled substance); *United States v. Thomas,* 484 F.2d 909 (6th Cir. 1973) (false state-

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7. The instruction was as follows:

The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond a reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of a fact.

It is entirely up to you as to whether you find any deliberate closing of the eyes, and the inferences to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness of knowledge.

ments to gun dealer); *United States v. Jewell, supra* (possession of narcotics, where automobile which defendant was driving contained large amounts of hidden marijuana); *United States v. Kershman,* 555 F.2d 198 (8th Cir. 1977) (unlawful distribution of narcotics, where defendant was a pharmacist and co-defendants had purchased a large number of narcotics on several occasions).[8]

Of course, in the instant case, the willful blindness theory was applied in a situation far more complex than those extant in the above-cited cases. The Government utilized the willful blindness instruction to argue that Massa "knew" of the scheme to defraud Stix through the manipulation of the accounts. This instruction, contrary to the panel's assertion, was particularly inappropriate in the present case where the fact which Massa is deemed to have knowledge of was not the presence of a controlled substance or stolen property, but the existence of an elaborate scheme involving the inner workings of the brokerage firm, a fact which alluded the experts at the SEC and Stix itself. Moreover, in conjunction with this instruction, the jury was not told specifically which fact or facts the instruction applied to. *Compare United States v. Kershman, supra; United States v. Thomas, supra.* This allowed the Government to argue extensively that even though they didn't have to prove that Massa knew of the account manipulation, Massa's willful blindness to this fact satisfied their burden. (Tr. XIII p. 113-123) Finally, the instruction was given without the balancing language which has been recognized as necessary to prevent the jury from applying an "objective" or "should have known" standard. In particular, the jury was not instructed that they must find that Massa must have been

8. These cases were relied on by the panel in its discussion of the propriety of the instruction.

aware of the high probability of the existence of the manipulation scheme, nor were they instructed that the knowledge element was not satisfied if they should find that Massa actually believed the scheme did not exist—no matter the extent of the objective evidence to the contrary. This latter omission severely undercut the efficacy of Massa's testimony.

IV. *The Panel Failed to Address the Issue of the Admissibility of the Opinion Evidence of Government Witness William Gaynor*

Appellant Massa was found guilty, *inter alia*, of five counts of causing Stix to keep false books and records in violation of 15 U.S.C. 78q(a)(1). The Government presented evidence in the form of the opinion evidence of William Gaynor as to the type of records which were required to be kept by Stix and, more particularly, that the subordinated loan agreements submitted by Massa were "false" because they failed to designate the beneficial owners of the accounts. Massa unsuccessfully objected to the admission of this expert testimony at trial on the basis that it was misleading and usurped the function of the judge and jury. This issue was raised and briefed in the instant appeal, however, the panel did not address it in its Opinion.

Accordingly, Appellant Massa respectfully requests this panel to grant the instant petition and grant a rehearing so that this issue may be considered.

CONCLUSION

Based on the foregoing arguments and authorities, Appellant James Massa respectfully requests this Honor-

able Court to grant the within petition for rehearing or rehearing en banc.

Respectfully submitted,

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APPENDIX

1. On page 18 of the Opinion, the panel states that Massa told Maeras to "forge" A.E. Shaw's name on a loan document. There was absolutely no evidence presented to support the notion that Maeras' action was a forgery. Maeras testified that he had his wife's permission to sign her maiden name—A.E. Shaw—to the document. (Tr. VI p. 163);

2. On page 20 of the Opinion, the panel states that Massa received monthly statements showing the false collateral on his account. This statement is misleading as it implies that the statements on their face show the false nature of the collateral. This is not the case; the Government's expert testified that the reports from Stix would lead anyone to believe that the collateral was legitimate. (Tr. X p. 94);

3. On page 11 of the Opinion, the panel states that Skinner prepared Massa's income tax during the years of the conspiracy. This statement is erroneous; no evidence was offered by any party to support it;

4. On page 3 of the Opinion, the panel states that Massa drew up the A.E. Shaw loan agreement. The evidence presented at trial established that Stix prepared the Shaw agreement and forwarded the papers to Massa. (Tr. IV p. 143-144);

5. On page 5 of its Opinion, the panel states that Brimberry, Massa and Skinner took frequent trips to Las Vegas together and traveled on more than one occasion to Hawaii, Disney World, the Bahamas and Monte Carlo. There was no evidence at trial that Massa went to Las Vegas or to the other places mentioned together with Skinner and Brimberry. This is clearly an instance of the panel's imputing Skinner's activities to Massa.

CERTIFICATE OF SERVICE

I, Daniel Patrick Leonard, counsel for Appellant James Massa, hereby certify that on this 27th day of August, 1984 I served the within Petition for Rehearing and/or Suggestion for Petition for Rehearing En Banc upon all parties to this action by mailing copies thereof, postage prepaid, first-class mail, to Terry Adelman, Assistant United States Attorney, 1114 Market Street, St. Louis, Missouri 63101, and to Byron Fox, Esquire, 1500 Mercantile Tower, 1101 Walnut Street, Kansas City, Missouri 64106, counsel for Appellant Duane Skinner.

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